IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No.

BEN PRESTON, *Petitioner,*

v.

KAW PIPE LINE COMPANY, ET AL., *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT.

(A) THE OPINIONS AND ORDERS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals, Tenth Circuit, in *Case No. 2142, Ben Preston, Appellant* v. *Kaw Pipe Line Company, et al., Appellees,* is reported in 113 Fed. (2d) 311; and its date, and the date of said court's order therein, are both June 28, 1940. (R. 61, 65.) A Petition for Rehearing, filed by the Appellant, was denied by an order entered by said Court on August 9, 1940. (R. 86.)

No opinion was rendered by said court in *Case No. 2022, Ben Preston, Appellant,* v. *Kaw Pipe Line Company, et al.,*

Appellees; but an order of submission and dismissal was entered by said court on June 28, 1940. (R. 60)

No opinion was rendered by the United States District Court for the District of Kansas, First Division, in *Case No. 4296, Ben Preston, Plaintiff,* v. *Kaw Pipe Line Company, et al., Defendants;* but an order was entered therein by said court on September 14, 1939, sustaining the Defendants' motion to dismiss the complaint in said cause (R. 31, 32), and a final judgment was entered in said cause on May 13, 1940. (R. 46, 47.)

(B) GROUNDS ON WHICH JURISDICTION OF THIS HONORABLE COURT IS INVOKED.

The annexed foregoing petition for a Writ of Certiorari contains an outline of the grounds on which jurisdiction of this Honorable Court is invoked, under the heading (D) Reasons Relied on for the Allowance of the Writ, in which said reasons are listed as follows, and are discussed:

(I) The Circuit Court has rendered an erroneous decision, contrary to, and in conflict with, decisions of other Circuit Courts, and of this Honorable Court, on the same matter.

(II) The Circuit Court has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower court, as to call for an exercise of supervision by this Honorable Court.

(III) The Circuit Court has misinterpreted or ignored salient and controlling facts of record, admitted by the Respondents.

Under the circumstances, in order to conserve space, and to obviate repetition, the grounds on which jurisdiction of this Honorable Court is invoked will not be dealt with, further, at this point.

(C) CONCISE CHRONOLOGICAL STATEMENT OF THE CASE.

The annexed foregoing Petition for a Writ of Certiorari contains a concise statement of the case, under the heading:

(A) Chronological Summary Statement of the Matter Involved.

Therefore, in the interest of brevity, and to avoid repetition, a statement of the case will not be repeated here.

(D) SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

(I) Errors Relating to the Fact that the Circuit Court Has Rendered a Decision Contrary to, and in Conflict With, Decisions of Other Circuit Courts, and of this Honorable Court, on the Same Matter.

(1) The Circuit Court erred in finding and holding

(a) That Petitioner's conduct "effectively estops him from asserting any claim to this property" (R. 64, 65); and that Court's decision is erroneous, on the grounds that it is contrary to, and in conflict with, decisions of other Circuit Courts, and of this Honorable Court, on the same matter.

(2) The Circuit Court erred in failing to find and hold:

(a) That continuous litigation involving title to and possession of the leases covering the property involved has tolled the running of any possible equitable estoppel against the Petitioner.

(b) That, whether or not the character of the pending litigation clouding the title of the Petitioner to leases covering the lands involved was such as to prevent the Petitioner from asserting his claim and title thereto, is immaterial to the issues in this proceeding.

(c) That no obligation has rested at any time, either in law or in equity, upon the Petitioner to institute court proceedings in order to assert, successfully, his claim to leases covering said lands.

(d) That, under and by virtue of the escrow agreement, the Bunker Hill State Bank was bound and compelled, as a matter of law and equity, as soon as the Petitioner erected a derrick, placed machinery, and spudded in a test well, to deliver to the Petitioner the leases covering the lands involved which were held in escrow by that bank.

(e) That the leases placed in escrow with the Bunker Hill State Bank, assignments of which were held by the Petitioner, are superior to all claims, rights, titles, or interests, in and to all of the leases held by the Respondents, and are by them held in trust for the use and benefit of the Petitioner, with the full power of the Petitioner to enter upon and explore said properties for oil and gas.

(f) That the Petitioner has at all times complied, insofar as he has been permitted to do so by the Respondents, with the escrow agreement and with the provisions of the leases covering the lands involved; and that, by virtue of the assignments to him, said Petitioner claims and has an equitable ownership to all of said oil and gas leases, with the full benefit of all the terms thereof, and with the right to proceed with the drilling of wells on said block of land.

(g) That, by reason of the wrongful acts and doings of the Respondent bank and of Respondent lessors, who placed the leases executed by them covering the property involved in escrow with said bank, and the breach of the terms of their contracts and agreements, said Respondents are estopped, in equity, from denying that the Petitioner became the equitable owner, and is now the owner, of said leases; and are estopped from claiming or asserting that said leases expired by their respective terms, because by reason of the acts and conduct of said bank and of said lessors the Petitioner was prevented from further performing his agreement and was relieved therefrom until the said lessors and bank shall have performed on their part the obligations imposed upon them; and are estopped, also, from denying that the said Petitioner is not now entitled to have the full

time provided for in said leases for the performance of said agreements and all other obligations devolving upon him, after the delivery to him of said leases, or other similar leases in lieu thereof, subsequent to the time when the court shall have adjudged said Petitioner to be the equitable owner of said leases and to be entitled to delivery thereof.

(h) That continuous litigation, involving title to and possession of the lands involved, the execution by the Respondent lessors of new leases to parties other than the Petitioner, and the placing of those new leases of record, clouded the Petitioner's title to the lands in issue and tolled the Kansas Statute of Limitations, even if that statute properly should be held pertinent to the issues in this equity proceeding, because of the fact that said statute has never commenced to run.

(II) Errors Relating to the Fact that the Circuit Court Has Departed from the Accepted and Usual Course of Judicial Proceedings.

(1) The Circuit Court erred in finding and holding:

(a) That the action of the District Court in refusing to permit the Petitioner to amend his complaint should be affirmed.

(b) That said District Court's final judgment and decree dismissing the complaint of the Petitioner should be affirmed, notwithstanding the fact that said District Court, in violation of the applicable law and Court Rules required the Petitioner to furnish a list of assignees of interest in the escrow agreement applicable to the lands here involved, after said District Court had ceased to have jurisdiction over the cause of action.

(c) That it was justified in rendering its opinion and entering its order in Case No. 2142, *supra*, before the supplemental transcript of the record of the District Court proceeding could even be ordered by the Petitioner (Ap-

pellant there), or printed under the supervision of the Clerk of the Circuit Court; and in having its order signed by only two Justices, only one of whom sat in the case at the time it was heard.

(III) Errors Relating to the Fact that the Circuit Court Has Misinterpreted or Ignored Salient and Controlling Facts of Record, Admitted by Respondents.

(1) The Circuit Court erred in finding and holding:

(a) That: "The only excuse offered by plaintiff for this inordinate delay in instituting his action is that the acts of defendants and the bank in refusing to deliver the leases, and pending litigation, have prevented him from carrying out the agreement to drill a well". (R. 64.)

(b) That: "Nothing appearing in the record indicates that there was anything in the pending litigation preventing plaintiff from either proceeding with the completion of the well or from asserting his rights to the leases in any court of competent jurisdiction". (R. 64.)

(c) That: "There was, therefore, a period of eight years when apparently no litigation was pending". (R. 64.)

(d) That the Petitioner stood by for more than fourteen years without asserting a claim to the lands involved; and that Petitioner's conduct in standing by for more than fourteen years effectively estops him from asserting any claim to said lands. (R. 64.)

(e) That: "The leases were five year leases, providing by their terms that they were to expire five years from date unless oil and gas was then being produced on the premises". (R. 62.)

(f) That: "The original leases have expired by their own limitations. Other leases have been given to other parties who have developed the premises and brought in production". (R. 64.)

(g) That: "Fourteen years have passed since plaintiff spudded in his well and claims to have been entitled to the possession of these leases. During all these years plaintiff stood by and did nothing to enforce the claim which he now asserts". (R. 64.)

(2) The Circuit Court erred in failing to find and hold:

(a) That, at no time, has the Petitioner been remiss in complying with his contractual obligations relative to the drilling of an oil and gas well upon the property involved; also, that the two years' extension of the escrow agreement granted by the Respondent lessors to the Petitioner's predecessors in interest provides that the Petitioner "agrees to undertake the completing of said leasing of said block and if successful, agrees to commence a test well on said block within the time herein provided". (R. 21, Ex. D.)

(b) That the Petitioner "has at all times since the execution of the oil and gas leases involved, and the entering into of said escrow agreement, been ready, able and willing to carry out all of the provisions of said leases and said escrow agreement by drilling a well on said premises or some portion thereof as provided by said escrow agreement, but has been prevented from so doing by the acts and conduct of said defendant lessors." (R. 12, 13.)

(c) That: "In absolute violation of the escrow agreement and the oil and gas leases executed by said lessors, the said escrow bank returned all of said oil and gas leases to the said defendants (Respondents) and refused to deliver said oil and gas leases to the plaintiff (Petitioners) or his agents after due demand." (R. 11, 12.)

(d) That the reasons why the oil and gas well, which was spudded in and drilled by the Petitioner to a depth of 600 feet on the property involved, was never completed was the refusal of the escrow-bank Respondent to deliver to the Petitioner the leases held in escrow by it, and continuous litigation the pendency of which clouded the Petitioner's

title, also, delivery of top leases by the lessor Respondents to other parties, thus clouding the Petitioner's title to the property. (R. 10, 11, 12, 13, 14.)

(e) That the Respondents had actual notice of the Petitioner's claim and title to the lands involved, and had a demand by the Petitioner for delivery of the leases covering said lands; that the escrow agreement and the assignment thereof to the Petitioner were recorded, thereby providing constructive notice to the Respondents of the Petitioner's claim and title; and that the Petitioner has at all times fulfilled his obligations under the agreement imposed upon him, and has stood ready, willing and able to complete the oil and gas well according to the terms of the same. (R. 9, 10, 11, 12, 13, 20, 21, 22, Ex. B., Ex. C, Ex. D.)

(f) That: "The said defendant (Respondent), M. K. Mathews, Cashier of the Bunker Hill State Bank, entered into an agreement and conspiracy with the lessor defendants (Respondents) * * * to defeat the rights of this plaintiff (Petitioner) in and to said properties, although this plaintiff (Petitioner) had complied in every particular with the escrow agreement and the extension agreement, and had expended large sums of money in the procuring of said leases, the assembling of the block and work necessary to the location of the structure, upon said premises described in said leases, which would be suitable for the drilling of a well for oil and gas purposes, and relying upon said escrow agreement and the provisions of said leases so placed in escrow, and the representations made by said bank through its agents, servants and employees, and the lessors, did expend large sums of money looking to the benefit and the ultimate results which would inure to the lessors executing said leases; but that the said bank and the said defendants (Respondents) last above named, and lessors, destroyed all of said leases, therefore, a lease with the signatures could not be attached to the complaint, * * *

because all of said leases are in the possession of said defendants (Respondents) last above named, and cannot be obtained by the plaintiff (Petitioner) after due diligence, inquiry and search." (R. 11, 12.) (Interpolated matter ours.)

(g) That all of the Respondent lessors, by and through said Mathews, Cashier of the Bunker Hill State Bank, and other parties, executed oil and gas leases upon all the lands here involved; that said lands have been continuously under top-leases to Respondent parties other than the Petitioner, since the provisions of said escrow agreement were violated by said Respondents; and that, thereby, said Respondents clouded the title of the Petitioner in and to said oil and gas leasehold estate, and prevented him from completing drilling operations upon said lands. (R. 12.)

(h) That the Petitioner's complaint prays that a receiver shall be appointed to take charge of and operate the properties here involved, to produce the oil therefrom, and to market the same subject to the orders of the court; and that Respondents who have heretofore produced oil and gas from said properties be required to account for the same. (R. 15, 16.)

(E) ARGUMENT.

(I) Arguments Addressed to the Fact that the Circuit Court Has Rendered a Decision Contrary To, and in Conflict With, Decisions of Other Circuit Courts, and of this Honorable Court, on the Same Matter.

(1) The Circuit Court's Decision is Erroneous; it is Contrary to, and in conflict with, prior decisions of other Circuit Courts, and of this Honorable Court; and it should be reviewed and reversed.

(a) It is true that the facts of record in this equitable proceeding, require application of the principles of equitable estoppel. But the Circuit Court has misconceived, or ignored, those principles, it has erred in that it has not applied correct principles to the facts of record here, and it has "gotten the wrong sow by an ear", when it holds that equitable estoppel should be applied against the Petitioner. Under prior decisions of other Circuit Courts, and of this Honorable Court, on the same matter, the Petitioner's conduct does not operate to estop him, in equity, from asserting, successfully, his claim and title to the leases covering the lands involved, because both his blameless conduct, and the censurable conduct of the Respondents, have tolled equitable estoppel against the Petitioner. Equitable estoppel attaches to the Respondents, instead of to the Petitioner, under the facts of record here.

(FIRST) THE DECISIONS OF OTHER CIRCUIT COURTS, AND OF THIS HONORABLE COURT, ARE CONTRARY TO, AND IN CONFLICT WITH, THE DECISION OF THE CIRCUIT COURT HERE IN ISSUE.

The Circuit Court finds and holds, in substance, that the judgment of the District Court should be affirmed, for the reasons that the Petitioner is estopped, in equity, it decides, from successfully enforcing his claim and title to leases covering the lands involved, on the grounds that he has been guilty, it decides, of laches and speculative delay. (R. 61-65.)

The decision of the Circuit Court here under review is erroneous, in the light of the facts of record, because it

is contrary to and in conflict with, the decisions of other Circuit Courts, and of this Honorable Court, among which are the decisions cited below:

Oklahoma v. *Texas*, 268 U. S. 252.
Crary v. *Dye*, 208 U. S. 515.
Hobbs v. *McLean*, 117 U. S. 567.
Steel v. *St. Louis Smelting Co.*, 106 U. S. 447.
Brant v. *Coal Co.*, 93 U. S. 326.
Henshaw v. *Bissell*, 85 U. S. 255.
Standard Oil Co. v. *U. S.*, 107 F. (2d) 402. (Circuit Court, Ninth Circuit; 1939, 1940.)
U. S. v. *Georgia*, 106 F. (2d) 955. (Circuit Court, Fifth Circuit; 1939.)
National City Bank v. *Euclid Loan Co.*, 104 F. (2d) 712. (Circuit Court, Sixth Circuit; 1939.)
Branham v. *Johnson*, 85 F. (2d) 807. (Circuit Court, District of Columbia; 1936.)
Jones v. *Winchester Repeating Arms Co.*, 61 F. (2d) 774. (Circuit Court, Second Circuit; 1932.)
Lamborn v. *Hardy*, 1 F. (2d) 679. (Circuit Court, Sixth Circuit; 1924.)
Hamilton v. *Empire Gas & Fuel Co.*, 297 F. 422. (Circuit Court Eighth Circuit; 1924.)
U. S. v. *Wilson & Co.*, 214 F. 630. (Circuit Court, Arkansas Circuit; 1914.)
Boyd v. *Northern Pacific Ry. Co.*, 170 F. 479. (Circuit Court, Washington Circuit; 1906.)
Ulman v. *Clark*, 75 F. 868. (Circuit Court, West Virginia Circuit; 1896.)

(SECOND) SUMMARY DIGEST OF THE OUTSTANDING ESSENTIAL ELEMENTS OF THE PRINCIPLES GOVERNING EQUITABLE ESTOPPEL.

The Circuit Court misconceived, or ignored, the outstanding essential elements of the principles governing the application of equitable estoppel, when it found and held that equitable estoppel should be applied against the Petitioner, under the facts of record, admitted by the Respondents, in this case.

What are the outstanding, essential elements of the principles governing equitable estoppel, as defined by the accredited text-books and encyclopedias, and the cases referred to with therein, and as disclosed by the decisions, particularly the prior decisions of other Circuit Courts, and of this Honorable Court?

A summary digest of the outstanding essential elements of the principles of equitable estoppel follows:

"Equitable estoppel, or estoppel by conduct, has its foundation in the necessity of compelling the observance of good faith; because a man cannot be prevented by his conduct from asserting a previous right, unless the assertion would be an act of bad faith towards a person who had subsequently acquired the right." (*Bispham's Principles of Equity, Tenth Edition,* Sec. 282, p. 480, *et seq.;* See, also, *Bigelow on Estoppel, Fifth Edition,* p. 570, *et seq.,* and *Sixth Edition,* p. 602, *et seq.*)

"The principle runs through the whole doctrine of estoppel that a man is only prevented from alleging the truth when his assertion of a falsehood or his silence has been the inducement to action by the other party which would result in loss if the opponent was permitted to gainsay what he had before asserted, or induced the other to believe by his acts. * * * It is the presence of this bad faith, either in the intention of the party, or by reason of the result which would be produced if he were permitted to deny the truth of his statement, that distinguishes this species of estoppel from estoppel at common law." (*Bispham's Principles of Equity, Tenth Edition,* Sec. 282, p. 481, *et seq.;* See, also, *Bigelow on Estoppel, Fifth Edition,* p. 570, *et seq.,* and *Sixth Edition,* p. 602, *et seq.*)

The essential elements enumerated below must be present, as a matter of fact, before equitable estoppel attaches:

"1. There must have been a false representation or concealment of material facts.

"2. The representation must have been made with knowledge, actual or virtual, of the facts.

"3. The party to whom it was made must have been ignorant actually or permissibly of the truth of the matter.

"4. It must have been made with the *intention*, actual or virtual, that the other party should act upon it.

"5. The other party must have been induced to act upon it." (*Bigelow on Estoppel, Fifth Edition*, p. 570, and *Sixth Edition*, p. 602, *et seq.*; see, also, *Bispham's Principles of Equity, Tenth Edition*, p. 481, Note (4).)

"The party setting up the estoppel must actually be deceived by the conduct of the other party. If he acts with the full knowledge of the rights and titles of the other party, he can not complain if that title is subsequently asserted. There can be no fraud when all the parties interested are equally informed of all the facts and mutually assent to them. * * * And the same rule applies where both parties have equal means of ascertaining the facts." (*Bispham's Principles of Equity, Tenth Edition*, p. 490.)

"The party against whom an estoppel is alleged must intend that his conduct should be acted upon * * *. If there is no intention that the conduct should be an inducement to the action of others, there can be no estoppel by such conduct." (*Bispham's Principles of Equity, Tenth Edition*, p. 491.)

The general nature and essentials of equitable estoppel are summarized by *21 Corpus Juris*, at the pages indicated below, as follows:

"Estoppel by misrepresentation, or equitable estoppel, is defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy. This estoppel arises when

one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." (Citing a long line of opinions rendered by this Honorable Court and by Circuit Courts, which will not be listed here, for lack of space) (Pp. 1113, et seq.)

* * * * * * *

"It is an essential element of an equitable estoppel that the acts, representations, or silence relied on to create the estoppel must have been willfully intended to lead the party setting up the estoppel to act upon them * * *. It is sufficient if the acts, representations, or silence relied on are of such a character as to induce a reasonable and prudent man to believe that they were meant to be acted on." (Citing numerous decisions of this Honorable Court and of Circuit Courts) (Pp. 1120, 1121)

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"And it has been said that fraud or bad faith is a necessary ingredient of misrepresentation by passivity." (Citing numerous decisions) (P. 1123)

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"It is an essential element of equitable estoppel that the person invoking it has been influenced by and has relied on the representations or conduct of the person sought to be estopped." (Citing numerous decisions) (P. 1126)

* * * * * * *

"There can be no equitable estoppel where the complainant's act appears to be rather the result of his own will or judgment than the product of what defendant did or represented. The act must be the immediate or proximate result of the conduct or representation, which must be such as the party claiming the

estoppel had a right to rely on." (Citing numerous decisions) (P. 1129)

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"A public record is an available means of information as to questions of title, and one who does not take advantage of it cannot claim an estoppel against one who merely fails to furnish such information." (Citing cases) (P. 1131)

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"The representations or conduct relied on to raise the estoppel must have been concurrent with or anterior to the action which they are alleged to have influenced." (Citing numerous decisions) (P. 1132)

* * * * * * *

"As an estoppel in pais is never allowed to be used as an instrument of fraud, but only to prevent injustice, it is therefore essential that the party claiming the benefit of the estoppel should have proceeded in good faith." (Citing a long line of decisions including several opinions of this Honorable Court) (P. 1138)

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"Where an estoppel exists against an estoppel, the matter is set at large." (Citing opinions of this Honorable Court and of the Circuit Courts) (P. 1139)

The general rule, in connection with failure to assert title or right, is stated by *21 Corpus Juris,* at the pages noted below, to be as follows:

"Where a person stands by and sees another about to commit or in the course of committing an act infringing upon his rights and fails to assert his title or right, he will be estopped afterward to assert it." (Citing numerous opinions of this Honorable Court and of Circuit Courts) * * * Also, "no estoppel arises *unless it was the duty of the party against whom the estoppel was claimed to speak, and unless he had the oppor-*

tunity to speak. And it is further necessary that his silence or passive conduct actually misled the other to his prejudice. There can be no estoppel where the party claiming it was fully cognizant that he was invading the rights of another." (Citing numerous decisions) (Pp. 1152, 1153) (Italics supplied)

* * * * * * *

"Also an owner of property which another has assumed to convey without authority is not precluded by mere silence from subsequently claiming it. (Citing numerous cases) * * * No estoppel arises in favor of one having actual knowledge of the adverse title or interest, * * * or where the party claiming the estoppel is bound with constructive notice by the public records. * * * So in accordance with the general rules governing estoppel in pais, it is essential that the party setting up the estoppel should have relied on the conduct of the party against whom the estoppel is claimed, and that by reason thereof he was induced to purchase or take a mortgage of the land." (Citing numerous decisions) (Pp. 1155, 1156)

As to the issue of speculative delay, *21 Corpus Juris* has the following to say:

"One who with knowledge of the facts and *without objection* suffers another to make improvements or expenditures on, or in connection with, his property, or in derogation of his rights under a claim of title or right, will be estopped to deny such title or right to the prejudice of that *other who has acted in reliance on and been misled by his conduct.*" (Citing numerous decisions) (Pp. 1160, 1161) (Italics supplied)

* * * * * * *

"Pursuant to the general rule one who knowingly stands by and *without objection* suffers the purchaser of land to make improvements and expenditures thereon is estopped to contest such purchaser's title, where the latter has acted in reliance on and been misled by his conduct." (P. 1164) (Italics supplied)

This Honorable Court, dealing with the issue of equitable estoppel in *Oklahoma* v. *Texas*, 268 U. S. 252, 257, 258, held as follows:

> "Only where conduct or statements are calculated to mislead a party and are acted upon by him in good faith to his prejudice can he invoke them as a basis of such an estoppel. And if they relate to the title of real property '*where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.*' *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326, 336, 337 (23 L. Ed. 927); *Crary* v. *Dye*, 208 U. S. 515, 521, 28 S. Ct. 360, (52 L. Ed. 595)." (Italics supplied)

In *Crary* v. *Dye*, 208 U. S. 515, a proceeding involving title to a mining claim, this Honorable Court enumerated the principles of equitable estoppel in the language quoted below:

> "2. The principle of estoppel is well settled. It precludes a person from denying what he has said or the implication from his silence or conduct upon which another has acted. *There must, however, be some intended deception in the conduct or declarations, or such gross negligence as to amount to constructive fraud. Brant* v. *Virginia Coal & I. Co.*, 93 U. S. 326, 23 L. ed. 927; *Hobbs* v. *McLean*, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870. *And in respect to the title of real property, the party claiming to have been influenced by the conduct or declarations must have not only been destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. Brant* v. *Virginia Coal & I. Co., supra.* These principles are expressed and illustrated by cases in the various textbooks upon equitable rights and remedies." (Italics supplied)

This case is cited, with approval, by this Honorable Court in *Oklahoma* v. *Texas, supra.*

Hobbs v. *McLean*, 117 U. S. 567, and *Brant* v. *Coal Co.*, 93 U. S. 326, are cited with approval, by this Honorable Court in *Crary* v. *Dye, supra.* See, also, *Henshaw* v. *Bissell*, 85 U. S. 255.

Steel v. *St. Louis Smelting Co.*, 106 U. S. 447, 456, involves the issue of speculative delay. There, this Honorable Court said:

> "The principle invoked is that *one should be estopped from asserting a right to property, upon which he has, by his conduct, misled another,* who supposed himself to be the owner, *to make expenditures.* It is often applied where one owning an estate stands by and sees another erect improvements on it *in the belief that he has the title or an interest in it,* and does not interfere to prevent the work or inform the party of his own title. There is in such conduct a manifest intention to deceive, or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case, will not be permitted afterwards to assert his title and recover the property, at least without making compensation for the improvements." (Italics supplied)

On November 16, 1939, the Circuit Court, Ninth Circuit, decided the case of *Standard Oil Co.* v. *U. S.*, reported in 107 Fed. (2d) 402. On page 416, that court cited, with approval, the Case of *Brant* v. *Coal Co., supra,* and said:

> *"It is elementary that to effect an estoppel there must be conduct upon which the party asserting it was induced to act. The Standard must show not only that it was itself without knowledge of the true conditions of the title but that it had no convenient and available means of acquiring such knowledge.* (*U. S.* v. *Wilson & Co.*, 214 Fed. 630; *Brant* v. *Coal Co.*, 93 U. S. 326; *Oklahoma* v. *Texas*, 268 U. S. 252; *Henshaw* v. *Bissel*, 85 U. S. 255)." (Italics supplied)
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> "We are not disposed to disturb the finding that the Standard acted in good faith. The record is persuasive

that the trespass was the result of honest mistake of law or fact, or perhaps both. *But the Standard was not so taken by surprise as to be in a position to claim estoppel. It was put on notice by a long series of events of public record tending to cast formidable doubt on the State's title. While the government was, to a marked degree, dilatory, the delays were by no means all attributable to it. We think no sufficient case of laches or estoppel has been made out.*" (Italics supplied)

In *U. S.* v. *Georgia*, 106 F. (2d) 955, decided by the Circuit Court, Fifth Circuit, on October 30, 1939, the opinion of this Honorable Court in *Oklahoma* v. *Texas, supra,* was cited and followed.

National City Bank v. *Euclid Loan Co.*, 104 F. (2d) 712, was decided by the Circuit Court, Sixth Circuit, on June 9, 1939. In that case, that Circuit Court found and held that:

> "The party asserting estoppel must be able to show that he has been injured by the conduct of the other party and *that he had no knowledge or means of knowledge of the truth.*" (Italics supplied)

In *Branham* v. *Johnson*, 85 F. (2d) 807, decided in 1936, the Circuit Court, District of Columbia, cites and follows the opinion of this Honorable Court in *Crary* v. *Dye, supra.*

Jones v. *Winchester Repeating Arms Co.*, 61 F. (2d) 774, is a case decided in 1932 by the Circuit Court, Second Circuit, in which that court cites and follows the opinion of this Honorable Court in *Crary* v. *Dye, supra.*

In *Lamborn* v. *Hardy*, 1 F. (2d) 679, decided in 1924, the Circuit Court, Sixth Circuit, discussed the opinion of this Honorable Court in *Crary* v. *Dye, supra,* and distinguished the facts of record in the two cases.

See, also: *Hamilton* v. *Empire Gas & Fuel Co.*, 297 F. 422, decided by the Circuit Court, Eighth Circuit, in 1924; and *Boyd* v. *Northern Pacific Ry. Co.*, 170 F. 479, the decision in which was rendered in 1906 by the Circuit Court, Washington Circuit.

U. S. v. *Wilson & Co.*, 214 F. 630, was decided in 1914, by the Circuit Court, Arkansas Circuit. That case is cited and followed by the Circuit Court, Ninth Circuit, in *Standard Oil Co.* v. *U. S., supra,* decided on November 16, 1939.

Ullman v. *Clark,* 75 F. 868, was decided by the Circuit Court, West Virginia Circuit, in 1896. The following quotation from the opinion in that case is most pertinent to the facts in the case here at bar:

> "*The defendants* in this action have been guilty of inordinate haste and *have not exercised ordinary prudence nor a sound discretion, when they, in the face of the notices that were served of the claim that was asserted, publicly by the plaintiffs to these lands, went on, in defiance of these notices, and commenced their mining operations.* I am, therefore, of the opinion that *there cannot be imputed to the plaintiffs in this action such neglect and laches as justifies this court in refusing the motion asked for upon that ground.*" (Italics supplied)
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> * * * * * * *
>
> "The plaintiff in this action, prior to the time the lessees entered upon the lands in controversy for the purpose of opening mines and mining coal, gave a public notice to the public press, published in the county in which the land lies, of which the defendants were advised, warning all parties not to trespass upon their lands . . . Notwithstanding this notice, thus served, the parties, without making any effort or taking any steps to remove the cloud upon the title to this land, defying all prudential considerations, took steps to open up the mines and erect coke ovens for the purpose of manufacturing coke. It thus appears that they were fully apprised of the claims of the plaintiff. It was an easy matter for the defendants to have instituted their action at law and as ancillary to such action to have filed their Bill in Equity to have removed the cloud upon the title, but it does not appear that they took any such steps. On the contrary, they not only disregarded, but entirely ignored the notice given by plaintiffs."

(Third) The Circuit Court has misconceived, or ignored, the essential elements of the principles of equitable estoppel, and it has erred in applying those essential elements to the admitted facts of record, when it holds that equitable estoppel should attach to the Petitioner.

The Circuit Court has misconceived, or ignored, the essential elements of the principles of equitable estoppel, and it has erred in applying these essential elements to the facts of record in this proceeding, when it holds that equitable estoppel should be applied against the Petitioner, because essental elements to justify application of equitable estoppel are lacking in the Petitioner's conduct as disclosed by the record, in the light of the decisions of other Circuit Courts and of ths Honorable Court, for the following succinctly stated reasons, among others (R. 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21, 22; Ex. A, Ex. B, Ex. C, Ex. D):

First: The Petitioner's conduct has not been lacking in good faith; nor has he been guilty of any gross negligence which can amount to constructive fraud.

Second: The Petitioner has not been remiss in serving both actual and constructive record notice upon the Respondents of his claims and title to the lands involved.

Third: There has not been any concealment from the Respondents of any material facts by the Petitioner.

Fourth: The Respondents have not been ignorant, either actually or permissibly, of the truth as to the Petitioner's claim or title to the lands in question; nor have they been destitute of knowledge of the true state of the Petitioner's title.

Fifth: In the face of complete actual and constructive record knowledge of the Petitioner's claims and title to said lands, the Respondents have acted in such a manner as to attempt to challenge and override the Petitioner's rights.

Sixth: The Petitioner has never intended that the Respondents should act upon a false representation made by him, or upon a concealment of a material fact by him; and

the Respondents have not been induced to act upon any such conduct of the Petitioner.

Seventh: The Respondents, by their wrongful conduct in refusing to deliver the escrow leases to the Petitioner, after he had fulfilled all conditions precedent to such delivery, have deliberately and with complete knowledge, clouded the claim and title of the Petitioner to the lands in issue, thereby tolling the application of equitable estoppel against the Petitioner.

Eighth: The Respondents' acts have been the result of their own will and judgment, as they had complete knowledge of the Petitioner's claims and title to said property, rather than the product of what the Petitioner has done or represented, either affirmatively or by silence.

Ninth: No conduct, or silence, of the Petitioner has been the immediate or proximate cause of acts by the Respondents.

Tenth: The Respondents have not acted in good faith, and do not, with "clean hands," invoke in this proceeding equitable estoppel against the Petitioner; on the contrary, they have conspired to deprive the Petitioner of his lawful claim and title to said lands.

Eleventh: Continuous litigation, challenging the Petitioner's claim and title to said lands, has tolled the application of equitable estoppel against the Petitioner.

Twelfth: The placing by the Respondents, and the recording of top-leases running to parties other than the Petitioner upon the lands here in issue, have wrongfully clouded the Petitioner's claim and title thereto, thereby tolling the application of equitable estoppel against the Petitioner.

Thirteenth: At all times, complete facts as to the condition of the Petitioner's claim and title to said lands have been known to the Respondents, as well as to the Petitioner,

and both have had the same means of ascertaining the truth; therefore, no estoppel can lie against the Petitioner.

Fourteenth: Inasmuch as the Respondents' wrongful conduct estops them from successfully pleading equitable estoppel against the Petitioner, even if equitable estoppel would otherwise lie against the Petitioner, which is not a fact, the matter would be set at large, because one estoppel would cancel the other. (In addition to R. references, *supra*, see 21 *Corpus Juris*, p. 1139 and cases there cited.)

Fifteenth: No conduct of the Petitioner, which can be relied upon by the Respondents to raise equitable estoppel, occurred concurrently with, or anterior to, the action on the part of the Respondents which that conduct of the Petitioner is claimed to have influenced.

Sixteenth: The Petitioner has not, without vigorously voicing his objection, suffered the Respondents to make improvements or expenditures on the lands involved; on the contrary, he has strenuously objected thereto and has served both actual and record notice of his claim and title to said lands upon the Respondents; therefore, the doctrine of speculative delay, in connection with equitable estoppel, does not apply here.

Seventeenth: No obligation has devolved, at any time, either in law or in equity, upon the Petitioner to institute *court proceedings* in order to *assert* his claim to and title in the lands here involved. His conduct has asserted that claim sufficiently. (*Bispham's Principles of Equity, Tenth Edition*, Sec. 282; *Bigelow on Estoppel, Fifth Edition*, p. 570, *et seq.*, and *Sixth Edition*, p. 602, *et seq.*; 21 *Corpus Juris*, p. 1113, *et seq.*, including particularly pp. 1120, 1121, 1123, 1129, 1131, 1132, 1138, 1139, 1152, 1153, 1155, 1156, 1160 and 1164; *Oklahoma* v. *Texas*, 268 U. S. 252; *Crary* v. *Dye*, 208 U. S. 515; *Hobbs* v. *McLean*, 117 U. S. 567; *Steel* v. *St. Louis Smelting Co.*, 106 U. S. 447; *Brant* v. *Coal Co.*, 93 U. S. 326; *Henshaw* v. *Bissell*, 85 U. S. 255; *Standard Oil Co.* v. *U. S.*, 107 F. (2d) 402; *U. S.* v. *Georgia*, 106 F. (2d)

955; *National City Bank* v. *Euclid Loan Co.*, 104 F. (2d) 712; *Branham* v. *Johnson*, 85 F. (2d) 807; *Lamborn* v. *Hardy*, 1 F. (2d) 679; *Hamilton* v. *Empire Gas & Fuel Co.*, 297 F. 422; *U. S.* v. *Wilson & Co.*, 214 F. 630; *Boyd* v. *Northern Pacific Ry. Co.*, 170 F. 479; *Ullman* v. *Clark* 75 F. 868.)

Eighteenth: It is immaterial whether or not the character of the continuous litigation clouding the Petitioner's claim and title to said lands was such as to prevent the Petitioner from asserting his rights in a *court proceeding*, since, as has been demonstrated in *Seventeenth* above, no obligation has devolved at any time upon the Petitioner to institute *court proceedings* in order to *assert* his claim to and title in the lands in issue.

* * * * * *

The facts in the case of *Ullman* v. *Clark*, *supra*, analyzed under the last preceding heading of this argument, are almost identical with these in the case here at bar. In that case, notice was served upon the defendants of the rights of the plaintiff, which is exactly what was done in the instant case. The Petitioner here, as the record shows, served both actual and record notice upon all of the Respondents who have developed the lands here in issue, and all of them had notice of his rights, before they entered upon, or made any improvements to, the lands in issue. Notwithstanding the foregoing facts, in total disregard of that notice, the Respondent top-lessors gave and the Respondent top-lessees took, their top-leases, placed them of record, clouded the title of the Petitioner here, went upon the lands in issue after actual and record notice, contrary to vigorous protests made by the Petitioner, and developed those lands with their eyes open, and now come into a Federal Court of equity, *without* "clean hands," and contend that, although they knew all of the facts recited above, and although they knew what the rights of the Petitioner here are, took no steps whatever to protect any claim to title which they may have acquired, brought no suits to quiet their title, did nothing whatsoever except to thumb their noses at the rights and title of the Petitioner here to the lands in issue,

and yet they seek in the proceeding at bar to supersede the Petitioner and to wipe out his rights and title to said land, on the grounds that they allege he has been guilty of laches and should have equitable estoppel applied against him.

The position of the Respondents is untenable, it is submitted.

(b) Under and by virtue of the escrow agreement, and the leases, the Bunker Hill State Bank was bound and compelled, as a matter of law and equity, as soon as the Petitioner erected a derrick, placed machinery, and spudded in a test well, to deliver to the Petitioner the leases covering the lands involved which were held in escrow by that bank; and the Petitioner immediately acquired a vested interest in the property covered by the leases.

The opinion of the Circuit Court in this cause correctly finds and holds (R. 62) that "a well was spudded in while the escrow agreement was in full force."

The provisions of the escrow agreement (R. 20) and of the extension thereof (R. 21) bind the Bunker Hill State Bank to deliver the escrow leases to the Petitioner as soon as the Petitioner erected a derrick, placed machinery, and spudded in a test well.

It follows, therefore, that the bank was bound and compelled, as a matter of law and equity, under the facts of the case, as found and held by the Circuit Court in its opinion, to deliver to the Petitioner the leases covering the lands involved which were held in escrow by that bank.

That the oil and gas leases, the escrow agreement, and the extension agreement gave the Petitioner a vested interest in the property covered by the leases is demonstrated, as a legal proposition, by the general Statutes of Kansas and a long line of decisions, seventeen of which, six of them Federal cases, are cited below:

Burden v. *Gypsy Oil Co.*, 141 Kan. 147.
Black v. *Elkhorn Min. Co.*, 49 F. 549, 163 U. S. 445.
Brinkham v. *Empire Gas and Fuel Co.*, 120 Kan. 602.
Bouvier's Law Dictionary, Pages 27 to 36-37.
Lanyon Zinc Co. v. *Freeman*, 68 Kan. 691.

In Re Appeal of Stoughton, 88 Pa. 198.
Hardcastle v. *McCloskey*, 139 Kan. 757.
Strickler v. *Stanford*, 109 Kan. 43.
Wilson v. *Youst*, 43 W. Va. 826.
Gray v. *Cornelius*, 40 F. (2d) 67.
Ladd v. *Foster Investment Co.*, 26 F. (2d) 698.
Empire Gas and Fuel Co. v. *Stearn*, 15 F. (2d) 323.
Francis v. *Superior Oil Co.*, 102 F. (2d) 732.
Commissioner of Internal Revenue v. *McKinney*, 87 F. (2d) 811.
General Statutes of Kansas, Annotated, 1935, Sections 33-105 and 33-106.
Robinson v. *Smalley*, 102 Kan. 842.
White v. *Green*, 103 Kan. 405, 409.

(c) The leases placed in escrow with the escrow-bank, the assignments of which are held by the Petitioner, are superior to all other claims to the properties involved; all of the leases held by the Respondents are by them held in trust as trustees for the Petitioner; the Petitioner has at all times complied, insofar as he has been permitted to do so by the Respondents, with the escrow agreement, the extension thereof, and the provisions of the leases covering the lands involved; and, by virtue of the assignments to him, the Petitioner has acquired equitable ownership of all said leases.

The leases placed in escrow with the escrow-bank, the assignments of which are held by the Petitioner, included, and take priority over, and are superior to, the leases held by the Respondents. Since the Respondent escrow-bank refused to comply with its duty, under the law, as has been demonstrated under the last foregoing heading of this argument, when it refused to deliver to the Petitioner the leases covering the lands involved, which were held in escrow by that bank, it follows that an equitable trust was created, and that said leases are held by the Respondents, in trust, as trustee for the Petitioner.

As the Circuit Court found and held in its opinion (R. 62), the Petitioner has at all times complied, insofar as he has been permitted to do so by the Respondents, with the escrow agreement and with the provisions of the leases covering the lands involved. That opinion of the Circuit

Court finds and holds "that a well was spudded in while the escrow agreement was in full force" (R. 62), "that the bank refused to deliver the leases to Plaintiff but returned them to the landowners, who thereafter gave leases to other persons" (R. 62), and "that the action of the landowners and the escrow agent has prevented Plaintiff from completing the test well." (R. 62).

These findings of the Circuit Court are correct, as they are based squarely upon the facts of record. (R. 10, 12, 13).

Inasmuch as the Petitioner has not been estopped in equity, as has been demonstrated herein above, from successfully maintaining his claim to the property involved, it follows that, by virtue of the assignment (R. 20), of the escrow agreement to him, the Petitioner has equitable ownership of all said leases.

Although the oil and gas leases involved were not delivered by the escrow-bank to the Petitioner, in compliance with the requirements of the escrow-agreement and of the agreement extending the same, nevertheless, when the Petitioner had complied with his obligations under those agreements, an equitable title to the properties involved passed to him, and he still retains that title.

The complaint alleges more than complete compliance on the part of the Petitioner with his contract obligations, in that he did, within the time provided in the extension agreement (R. 21, Ex. d), and about four months prior to the expiration of the two years' extension of the escrow agreement, build his derrick, place machinery, spud in the well, and drill it to a depth of approximately 600 feet. Under the agreements, the Petitioner was entitled to have delivery of the leases when he spudded in the well; and he made demand for the leases at that time, which demand was refused by the escrow-bank.

The escrow-bank, in refusing to deliver the leases to the Petitioner, was remiss in its duties. What are the duties of an escrow holder? 10 *Ruling Case Law*, p. 633, *Sub-division* 15, outlines those duties as follows:

> "In a broad sense every depositary of an escrow is the agent of both parties for the purpose of making delivery upon the performance of the conditions. He is no less the agent of the grantee than the agent of the grantor. Strictly speaking, however, the depositary is not an agent at all, but rather the trustee of an express trust, with duties to perform for each of the parties which neither can forbid without the consent of the other. An escrow executed and deposited upon a valuable consideration is not revocable by the depositor, except according to the terms of the agreement and deposit, and the depositary, being as much the agent of the grantee as of the grantor, is as much bound to deliver the deed on performance of the conditions or happening of the event stipulated as he is to withhold it until such performance or happening. Furthermore, such delivery may be compelled by the party entitled to the instrument. It is the duty of the depositary to comply strictly with the conditions on which he holds a deed in escrow."

It follows that when a demand was made by the Petitioner upon the escrow-bank for delivery of the leases, after the Petitioner had complied with all of the obligations imposed upon him as a condition precedent to such delivery, he was entitled to the delivery of the leases, and the escrow-bank holder had no right to withhold delivery of them. And, although the delivery of the leases was not made by the escrow-bank holder, equitable title passed to the Petitioner. 21 *Corpus Juris*, p. 882, states that:

> "Unitil the performance of the condition, the legal title to the land to be conveyed remains in the grantor, but it has been held that the equitable title vests in the grantee."

After an instrument, such as a lease, has been placed in escrow, subsequent instructions by the grantor to the depositary, such as the escrow bank holder of the leases here involved, can not change the nature of the transaction. (*Grove* v. *Jennings*, 46 Kan. 366) The manual delivery of

the leases was not essential to transfer of the equitable title to the Petitioner, as the delivery of them to the escrow-bank holder was, in legal effect, a delivery of them to the Petitioner. (*Neal* v. *Owings*, 108 Kan. 73; *Davis* v. *Clark*, 58 Kan. 100; *Gault* v. *Hurd*, 103 Kan. 521; *Baker* v. *Snavely*, 84 Kan. 179; *Akins* v. *Holmes*, 89 Kan. 812)

The escrow agreement covering the leases in issue bears the date of June 25, 1921. The leases were placed in escrow at that time with the escrow-bank. When the leases and the escrow agreement were placed in the escrow-bank, the equitable title to the properties involved immediately passed to the Petitioner, subject only to performance on his part of all his contract obligations. The escrow agreement was extended in writing (R. 21) to September 21, 1924 by the lessors themselves.

At the time the escrow agreement was made on June 25, 1921 and the leases were deposited with the escrow bank, the equitable title to those leases and to the properties covered by them, passed to the Petitioner. The agreement extending the term of the escrow agreement was made and deposited with the escrow bank. Therefore, from June 25, 1921 until September 21, 1924, the equitable title to all of the leases vested in the Petitioner, with a requirement that he start drilling operations before the last named date. Under no conditions, could that equitable title be divested from the Petitioner prior to September 21, 1924, without his consent. If the Petitioner had failed to begin a well prior to that date, he would have forfeited that equitable title. However, on or about May 14, 1924 the Petitioner completed his derrick and spudded in his well. These actions by the Petitioner constituted complete compliance with all the requirements necessary to entitle him to delivery of the leases held by the escrow bank.

The equitable title to all of the leases vested in the Petitioner on June 25, 1921, or very shortly thereafter, and it was subject only to performance by him as required by the agreements. He performed, completely, in compliance with

his contract obligations, on or about May 14, 1924. Forthwith, title to the leases in issue vested completely in the Petitioner at that time, and he has never divested himself of that title.

Even before the Petitioner was required, under the escrow agreement and the extension thereof, to start drilling a well, the escrow-bank, trustee for both parties, brought suit (R. 10) to cancel the escrow agreement. This suit clouded the Petitioner's title, and, legally, relieved him of any obligation to perform any additional provisions of the outstanding agreements, until that cloud was removed. It has not been removed to date.

The return of the leases by the escrow-bank to the Respondent lessors herein did not, in any way, divest or impair the Petitioner's equitable title acquired by him under the terms of said leases. (*In Re Cornelius Estate*, 151 Cal. 550; *Citizens National Bank* v. *Davisson*, 229 U. S. 212) The opinion cited above, rendered by this Honorable Court, enunciates the following rule:

> "Upon the whole case, we are clear that the effect of the deposit of the contract and check with the bank was to constitute it a custodian or stake-holder for the benefit of both parties, holding the money without right or interest in it, bound, above all things, not to take sides between the parties and answerable ultimately to the one or the other, according to their respective rights as between themselves."

The escrow-bank not only refused to deliver the leases, as it was duty-bound to do, but before the time expired in which the Petitioner had to spud in his well, namely, September 21, 1924, the escrow-bank filed a suit, on April 2, 1924, to cancel the escrow agreement. (R. 10) By doing so, the escrow-bank flouted its lawful duty, as outlined by this Honorable Court in *Citizens National Bank* v. *Davisson*, *supra*, and took sides with the Respondent lessors herein against the Petitioner, wrongfully.

(d) By reason of the wrongful acts and doings of the Respondent bank, of Respondent lessors, and of Respondent top-lessees, said Respondents are estopped, in equity, from denying that the Petitioner is the equitable owner of said leases.

The record shows, in the complaint (R. 5-21), the allegations of facts in which have been admitted by the Respondents, that by reason of the wrongful acts and doings of the Respondent escrow-bank, of the Respondent lessors, and of the Respondent top-lessees, the Petitioner has been prevented from completing fulfillment of his obligations under the escrow agreement and the escrow leases. (R. 13) The Circuit Court, in its opinion, found and held "that the action of the landowners and the escrow agent has prevented plaintiff (Petitioner) from completing the test well" (R. 62).

It follows, therefore, that the Respondents are estopped, in equity, from denying that the Petitioner is the equitable owner of said leases.

(e) The Respondents are estopped from claiming that said leases are not now in full force and effect, because, by reason of the acts and conduct of said Respondents, the Petitioner was prevented from performing his agreement and was relieved therefrom, until the said Respondent lessors and escrow-bank shall have performed, on their part, the obligations imposed upon them.

The Circuit Court, in its opinion, found and held "that the action of the landowners and the escrow agent has prevented plaintiff (Petitioner) from completing the test well". (R. 62) That finding is substantiated by the facts alleged in the complaint admitted to be true by the respondents. (R. 13)

Under the circumstances, the Respondents are estopped from claiming, successfully, that said leases are not now in full force and effect, because, by reason of the acts and conduct of said Respondents, the Petitioner was prevented from performing his agreement and was relieved therefrom until the said Respondent lessors and escrow-bank shall

have performed on their part the obligations imposed upon them.

(f) The Respondents are estopped from denying that the Petitioner is now entitled to have the full time provided for in said leases for the performance of all obligations devolving upon him, after the delivery to him of said leases, or other similar leases, subsequent to the time when the court shall have adjudged the Petitioner to be the equitable owner of said leases and to be entitled to delivery thereof.

Since the Circuit Court has held and found "that the action of the landowners and the escrow agent has prevented plaintiff (Petitioner) from completing the test well" (R. 62), which facts are substantiated by facts alleged in the complaint, which the Respondents have admitted to be true (R. 13), it follows inescapably that the Respondents are estopped from denying that the Petitioner is now entitled to have the full time provided for in said leases for the performance of all obligations devolving upon him, after the delivery to him of said leases, or other similar leases, subsequent to the time when the court shall have adjudged the Petitioner to be the equitable owner of said leases and to be entitled to delivery thereof. This contention is advanced by the Petitioner in the complaint. (R. 13)

(g) Continuous litigation, involving title to and possession of the lands involved, the execution by the respondent lessors of new top leases to parties other than the Petitioner, and the placing of those new leases of record, clouded the Petitioner's title to the lands in issue and tolled the Kansas Statute of Limitations, even if that Statute properly should be held pertinent to the issues in this equity proceeding, because of the fact that said Statute has never commenced to run against the Petitioner.

The record discloses (R. 10, 11) the fact that the escrow-bank brought suit on April 2, 1924 to cancel the escrow agreement and the leases deposited thereunder, before the expiration of the time in which the Petitioner had to spud in his well, and that the escrow-bank's action, after having

been transferred from a Kansas Court to the United States District Court, was finally dismissed on June 22, 1926.

The record discloses, also, that "at various times some portion of the leasehold estate to the property involved herein has been in litigation, and *continuous litigation* since about April 2, 1924" (R. 12).

The fact is shown by the record that the case of *Taylor* v. *Focks Drilling and Manufacturing Corporation*, involving the properties here in issue, was decided finally on December 12, 1936. (R. 10, 11, 12)

The record shows, moreover, that: "The last suit involving any portion of the properties herein described was dismissed in the Supreme Court of the State of Kansas, in the month of July, 1938". (R. 12)

Although all of the proceedings comprising "continuous litigation" involving the properties in issue are not recited by the Petitioner in his complaint, the complaint states that the "plaintiff at the proper time will make proof thereof". (R. 11) And if the Petitioner had been permitted by the District Court, or by the Circuit Court, to amend his complaint, in accordance with the petition filed in his behalf in the District Court requesting that permission, the allegations in the complaint relative to "continuous litigation" would have been elaborated, and the proceedings comprising that "continuous litigation" would have been listed and commented upon by the Petitioner with more particularity. The offer to do all these things, also, to submit comprehensive evidence with respect to said "continuous litigation", made by the Petitioner, still stands.

The properties here involved were top-leased by the Respondent landowners, and have been continuously under such top-leases since the escrow-bank and those owners unlawfully and inequitably flouted the rights of the Petitioner by refusing to deliver the escrow-leases to him. Many of the top-leases were consummated before the expiration of the time which the Petitioner had under the terms of the escrow-agreement and of the extension thereof, to complete

his obligations, as a condition precedent to delivery of the said leases to him by the escrow-bank.

Under the great weight of the pertinent decisions, the filing of litigation, the top-leasing, or either of them, stopped and prevented the running of any statute of limitations; also the wrongful conduct of the Respondents estops them from pleading any statute of limitations against the Petitioner.

"Where a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right." (25 Cyc. 1278, Sub-Division (h))

* * *

"That the running of the statute of limitations may be postponed, or may be suspended, after it has commenced to run, for causes not specified in the statute, is well established. This basis of such exceptions was well stated by Mr. Justice Strong in the case of United States v. Wiley, 78 U. S. (11 Wall.) 508." (*Hutchinson* v. *Hutchinson,* 92 Kan. 518)

* * *

"Where a lessor of oil land has brought suit against the lessee for cancellation of the lease, he is not in a position to complain of the inactivity of the lessee during the pendency of the suit." (*Hamilton* v. *Empire Gas and Fuel Company,* 297 Fed. 422.)

Attention is respectfully invited to the case of *Weaver Mining Company* v. *Guthrie,* 189 Mo. App. 108, wherein the court said:

> "Where a lessor of mining property claimed a forfeiture of the lease and appealed from the judgment in favor of the lessee, he cannot, during the pendency of the appeal, in another suit insist that the lessee comply with those provisions of the lease requiring the installation of costly machinery and the continuous working of the mine, for that would place him in an inconsistent position."

On page 124 of the decision last above cited the court found and held:

> "The doctrine we applied in this case is much the same in principle as we applied by the trial court in the injunction suit of this defendant against this plaintiff, from which this plaintiff appealed, to-wit: That one person cannot take advantage of the failure of another to do some act required of him, when the complaining party has materially hindered or obstructed him in so doing. He cannot profit by his own wrong, or what may turn out to be his wrong. This is a species of estoppel, in that the complaining party has induced or compelled the other to do or refrain from doing what he otherwise would or could have done."

Again, in *Hudspeth* v. *Schmelzer,* 182 Okla. 416, the court said:

> "Notification by lessors to oil and gas lessee and his assignees that lessors were commencing suit to cancel lease, constituted an attack upon their title and relieved them of the duty during the continuance of attack of proceeding with the drilling operations, which they were ready to do, or of paying delay rental specified in lease."

In the opinion in the *Hudspeth case, supra,* at p. 1126, the court said, also:

> "Such a declaration of forfeiture is an attack upon the title of the lessees and they are thereby relieved of the duty of proceeding further during the continuance of the attack." (Citing cases decided by courts in Oklahoma, Indiana and Texas, in support.)

When the escrow-bank started suit to cancel the escrow-agreement, wrongfully turned back to the landowners the executed leases to the delivery of which the Petitioner was entitled, and the respondent landowners then executed new top-leases, these facts relieved the Petitioner of the duty of proceeding further during the continuance of the attack, which has continued to the present time, and still continues,

with the performance of unfulfilled obligations which at the time of such wrongful actions, devolved upon him.

In the case of *Blodgett* v. *Lanyon Zinc Company,* 120 Fed. 893, the Circuit Court said:

> "The grantor of an option, who prevents its exercise within the time specified in his grant, may not take advantage of the failure of its timely exercise, but must give a reasonable time thereafter, after the obstruction he interposed is removed."

On the issue of clouding title by the making of top-leases, attention is invited to the case of *Simons* v. *McDaniel,* 154 Okla. 168, in which the court lays down the following rule:

> "The act of lessors in granting what is known as top leases is an election to declare existing lease at an end and obstructs the exercise of rights under existing leases." (Second Syllabus)

* * * * * * * *

> "These acts obstructed the exercise of the rights of the original lessees under the terms of their lease. Their title was clouded. Had they produced oil or gas as a result of commenced development, ownership thereof would have been in litigation and the value of the production impounded, so that a real obstacle was imposed by lessors upon the right of lessee plaintiffs. (P. 420.)

* * * * * * * *

> "It is not necessary that we decide whether, after lessee commenced development of the lease in good faith, the right is a mere option or a vested interest in the leasehold estate, for considering the rights of lessee plaintiffs as those of an optionee, the rule is that when the party granting an option himself prevents its exercise during the time limited therefor, he must give a reasonable time for its exercise after any obstruction, which he has imposed, has been removed. This principle or law is founded on common justice and equity." (P. 420.)

Applying the law summarized above to the facts in the case at bar: The Respondents, who are operators upon the properties in issue, are all operating under top-leases wrongfully granted to them by the Respondent landowners. The record discloses that they had both actual and constructive record notice of the leases to which the Petitioner holds both equitable and legal title. The Respondent landowners knew that they had all executed and delivered prior leases to the Petitioner before they became parties to the wrongful and inequitable top-leases. They knew of the drilling of a well by the Petitioner. They knew that the Petitioner had complied completely with his contract obligations. They knew when they executed leases to the Respondent top-lessees that the time for the beginning of development by the Petitioner had not expired. They knew that they were clouding the Petitioner's title to the properties involved. And they should not be permitted to benefit by such wrongful and inequitable conduct.

It follows, inescapably, that no equitable estoppel can lie against the Petitioner to prevent him from successfully asserting his claim and title to the properties involved; and no statute of limitations can begin to run until the cloud has been removed from the Petitioner's title. That cloud has not yet been removed.

Upon the issue of the Kansas Statute of Limitations, the Respondents, in their reply brief, no doubt will indulge in considerable discussion as to whether oil and gas leases are real, or personal, property, and whether a five or fifteen year statute of limitations is applicable in Kansas. The position of the Petitioner is that, insofar as the issues now before this Honorable Court are concerned, it makes no difference whether the leases under consideration are real or personal property, because the Kansas Statute of Limitations has been tolled, under the facts in this proceeding.

The Circuit Court furthermore effectually disposed of this question when it said: "It is not necessary to determine whether the interest sought to be recovered is realty

or personalty; the cause of action asserted by plaintiff lies in equity. * * * whether he may maintain this action is to be determined by the equitable principle of estoppel and not by the applicable statute of limitations of Kansas." (R. 63).

(II) Arguments Addressed to the Fact that the Circuit Court Has Departed from the Accepted and Usual Course of Judicial Proceedings.

(1) The Circuit Court has departed from the accepted and usual course of judicial proceedings.

(a) Confirmation by the Circuit Court of the action of the District Court in refusing to permit the Petitioner to amend his complaint justifies exercise of its supervisory powers by this Honorable Court.

The record shows (R. 65) that the first appeal taken to the Circuit Court from the District Court, docketed as Case No. 2022, was dismissed for the reason that the order attempted to be appealed from was not a final order, since it was a dismissal of the "complaint" only and not a dismissal of the entire action. This would indicate that the case would be permitted to resume where it had been terminated temporarily in the lower court, by the filing of an amended complaint, if the Petitioner desired to file such an amended complaint.

The record (R. 37) discloses that the Petitioner asked leave to file an amended complaint after the cause had been remanded by the Circuit Court to the District Court, which request of the Petitioner was reduced to writing, and the record shows the Disrict Court's action upon this request, which was finally denied by that court (R. 46), this denial being the final judgment of the District Court from which the second appeal, docketed as Case No. 2142, was taken by the Petitioner to the Circuit Court.

The Circuit Court affirmed the judgment of the District Court in sustaining the defendants' motion to dismiss the

Petitioner's cause of action and in denying to the Petitioner permission to file an amended complaint (R. 61), although in the decree of the Circuit Court no specific mention is made of the fact that the Petitioner's request for permission to file an amended complaint was passed upon or denied by that court.

The Petitioner in due time filed his petition for rehearing (R. 67, 85) before the Circuit Court and assigned as one of the grounds upon which such a rehearing should be granted to him the fact that the District Court had denied the petition of the Petitioner for permission to file an amended complaint. The Circuit Court denied the Petitioner's petition for rehearing, and issued its mandate, in accordance with its opinion and judgment rendered and entered before the petition for rehearing was filed, to the District Court (R. 86).

It is submitted that the Circuit Court, in confirming the action of the District Court denying permission to the Petitioner to file an amended complaint, has departed from the accepted and usual course of judicial proceedings, in such a manner as to justify exercise by this Honorable Court of its supervisory powers.

That the District Court's action in denying the petition of the Petitioner for permission to file an amended complaint constitutes a departure from the accepted and usual course of judicial proceedings is demonstrated by a long line of decisions rendered by this Honorable Court, and by the several Circuit Courts of Appeal.

Rule 15 of the new Rules of Civil Procedure provide, in part:

> "(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served, or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time with twenty days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the

adverse party; and *leave shall be freely given when justice so requires.*" (Italics supplied.)

In a recent opinion rendered by this Honorable Court on February 6, 1939, in *Texarkana* v. *Arkansas-Louisiana Gas Company,* 306 U. S. 188-204, this Honorable Court found and held that: "A supplemental bill setting up facts occuring since the filing of the original bill as a ground for other or further relief may be filed after a remand by an appellate court for further proceedings."

Several additional opinions of this Honorable Court which are in point are summarized in *Insurance Company* v. *Svendsen,* 74 Fed. 346, as follows:

> "The Supreme Court of the United States in cases dismissed because the want of jurisdiction appeared on the record has repeatedly recognized the right of the court below to order such amendments as will cure the defect and hold the jurisdiction. *Everhart* v. *Huntsville College,* 120 U. S. 223; *King Bridge Company* v. *Otoe Company,* 120 U. S. 225; *Metcalf* v. *Watertown,* 128 U. S. 590; *Menard* v. *Goggan,* 121 U. S. 253. *The complainant's right to amend is recognized and admitted.*"

In *Bessemer Investment Company* v. *Chester,* 113 Fed. (2d) 571, the opinion in which was rendered by the Circuit Court, Third Circuit, on June 18, 1940, it is held that the filing of amended or supplemental complaints is in full accordance with the flexibility afforded under the new Rules of Civil Procedure.

The Circuit Court, Fifth Circuit, in *Jones* v. *Insurance Company,* 108 Fed. (2d) 123, decided on December 9, 1939, finds and holds that:

> "After remand of an equity case to a district court for further proceedings consistent with the opinion of the Circuit Court of Appeals on reversal of a decree appealed from, the parties may introduce other evidence and present new issues, not inconsistent with the

appellate court's judgment, by amendment of pleadings. 28 U. S. C. A., following Sec. 723c."

In *Fleitman* v. *McKinnon*, 238 Fed. 98, a Circuit Court, uses the language quoted below:

> "All these amendments the court allowed to be made over the objection of the defendant. And their allowance has been assigned for error. If we assume for the purposes of the case that the original complaint was defective in the particulars in which the above amendments were made, we should nevertheless have no difficulty in holding that the court was not in error in allowing the amendment to be made. The amendments were within the discretion of the court. See United States Revised Statutes, No. 954 (Comp. Stat. 1913, No. 1591). In allowing them to be made, the court served the ends of justice. To have refused their allowance under the circumstances would have been to adhere to a practice no longer in favor which sacrificed justice to technical rules. The original pleading did not mislead the defendant to her prejudice, as the amendments did not in any way change the note upon which the action was brought. The evidence clearly showed that the plaintiff was suing in a representative capacity."

In *Schindler* v. *Spackman*, 16 Fed. (2d) 45, a Circuit Court found and held that: "Under equity rules, a motion to dismiss performs the office of a demurrer", and that "on sustaining a motion to dismiss, opportunity to amend should be granted, unless the bill is incurably defective," also, at page 49 that: "However, we believe the appellant should not be subjected to such unnecessary delay, but that in the interest of justice the case should be reversed and remanded to the trial court, with direction that the appellant be permitted to amend his pleading, if so advised, in accordance with the views herein expressed, and within a reasonable time to be fixed by the trial court, and that a trial be granted upon issues thus to be framed."

To the same effect is the opinion of a Circuit Court, in *Wilson* v. *Lamberton*, 102 Fed. (2d) 506, which provides: "Ordinarily, courts exercise discretion liberally in permitting amendments so as not to deprive a litigant of a chance to bring his case to trial".

In the case at bar, the Respondents' motion to dismiss the Petitioner's complaint (R. 24) included, also, in Part 2 of that motion to dismiss, a motion to require the Petitioner to make his complaint more definite, specific and certain, in the event the court should overrule that portion of the motion directed to the dismissal of the complaint. No answer or other pleadings have been filed in the instant case by the Respondents, and the cause of action, therefore, has never been placed at issue, and has never been heard upon its merits. Therefore, the Petitioner, in petitioning the District Court for leave to file an amended complaint, for all practical purposes confessed that portion of the motion asking that the complaint be made more definite and certain.

The case here at bar is certainly one where "justice requires" that the Petitioner be permitted to file an amended complaint, before the rendering of adverse judgment against him, especially in view of the liberality allowed by the appellate courts of the United States in the matter of amending complaints pursuant to the new Rules of Civil Procedure. To refuse such a pleading would deprive the Petitioner of the right to have his case determined upon its merits, and would deny him the right to allege a valid cause of action, in the event it should be held, finally, that his first complaint has fallen short of the necessary allegations which, when admitted to be true by the respondents, excuse him of any possible alleged laches, neglect and delay in asserting his rights.

The District Court sustained the Respondents' motion to dismiss the complaint on the grounds that it decided the Petitioner's claim had been barred by the applicable Kansas Statute of Limitations, and on the further ground that the

Petitioner had been guilty of laches, thus estopping him from now asserting his claim as against the Respondents. The Circuit Court, in its opinion in this case, held that it was not necessary to base its decision upon the question of the Kansas Statute of Limitations, but that the issues should be determined by the principles of equitable estoppel; and that court held, also, in affirming the judgment of the District Court, that Petitioner by his conduct is estopped, in equity, from asserting any claim to the property here involved at the present time. No prejudice could result to the respondents if the Petitioner should be permitted to file an amendment to his complaint; on the other hand, it is submitted that justice would be served thereby.

If the Petitioner had been permitted by the District Court to file an amended complaint, he would have alleged, and the Petitioner contends he could have proved at the trial, facts, conduct on his part, records, and circumstances, which would more fully than the existing record does, answer all charges of laches, equitable estoppel, neglect, or delay, upon which the Circuit Court and the District Court have based their opinions adverse to the Petitioner.

Most certainly, under the authorities, the Petitioner should be accorded the right and opportunity to plead further in an attempt to frame a valid cause of action, in the event the allegations contained in the existing complaint are defective, which the Petitioner does not admit. And it is not to be expected, under the new Rules of Civil Procedure, that a pleader must file a perfect complaint at the outset, and shall forever thereafter be estopped from obtaining leave to improve the complaint by filing amendments thereto thereafter. The new Rules of Civil Procedure do not contemplate such a course of procedure by the courts. And confidence is expressed that this Honorable Court will not uphold the Circuit Court and the District Court in the interpretations placed by those courts, in the instant case, upon those Rules of Civil Procedure.

The filing of an amended complaint in this proceeding would establish, further, that the Petitioner is not barred from recovery because of either the five years or the fifteen years Statute of Limitations of the State of Kansas, or because of laches, delay or equitable estoppel. Furthermore, in consonance with the opinions of this Honorable Court and of the several Circuit Courts cited hereinabove if the Petitioner had been permitted to amend its complaint by the District Court, this cause of action would have been tried upon its merits, and not upon technical points of pleading.

(b) Confirmation by the Circuit Court of the District Court's final judgment and decree dismissing the complaint of the Petitioner, notwithstanding the fact that the District Court, in violation of the applicable law and court rules, required the Petitioner to furnish under duress, a list of assignees of interest in the escrow agreement applicable to the lands here involved, after said District Court had ceased to have jurisdiction over the cause of action, warrants exercise of its supervisory authority by this Honorable Court.

The Petitioner filed his notice of appeal on May 24, 1940 in the office of the Clerk of the District Court, announcing that he appealed from the judgment of the District Court, entered on May 13, 1940, wherein that Court denied him the right to file an amended complaint, and entered a final order dismissing his action to the Circuit Court, which case was docketed in said court as Case No. 2142. (R. 57)

On the same day, but following the filing of that notice of appeal, the District Court ordered the Petitioner to furnish a list of assignees of interest in the escrow agreement (R. 54, 56), which was actually filed on May 27, 1940. The District Court had, in fact, lost jurisdiction of this case after the notice of appeal had been filed. However, the record (R. 51) shows the following interchange between the Court and counsel for the Petitioner:

> "Mr. Martin: May I also inquire if it is the order of the Court that the Court still retains jurisdiction of this case?

"The Court (Justice Hopkins): I retain jurisdiction for the purpose of this investigation, yes, sir."

Rule 73 of the new Rules of Civil Procedure, governing appeals to all United States Circuit Courts provides the time and manner of taking an appeal to the Circuit Courts, and specifies that a District Court is divested of jurisdiction after a notice of appeal is filed. It states in part:

"When an appeal is permitted by law from a district court to a circuit court of appeals, and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal."

The Record (R. 47-51) clearly indicates that the District Court Judge recognized that he had lost jurisdiction of the case at the time he demanded this information; but that notwithstanding this fact he stated that he was retaining jurisdiction of it for the purpose of securing the same, thereby arbitrarily and capriciously overriding the rules applicable to his court.

That action taken by Justice Hopkins was unwarranted for the additional reason that the information exacted from the Petitioner had then, nor can it have, any remote pertinency to the issues in this cause which were, or are, at bar. It would seem that a presumption is permissible under the circumstances, that Justice Hopkins resorted to a "fishing expedition" for the purpose of constraining the Petitioner to divulge information in regard to his private affairs which was desired by parties unknown, all of which was done over the vigorous protest of counsel for the Petitioner, as the record amply demonstrates.

(c) By rendering its opinion and entering its order in Case No. 2142 in such a manner that its opinion was rendered before the supplemental transcript of the record of the District Court proceedings could even be ordered by the Petitioner or printed, and by virtue of the fact that its order was signed by only two justices, only one of whom sat in the case at the time when it was heard, the Circuit Court has laid itself liable to exercise by this Honorable Court of its supervisory power.

With respect to the Circuit Court's error in rendering its opinion and entering its order in Case No. 2142 before the supplemental transcript of the record of the District Court proceeding could even be ordered by the Petitioner, or printed under the supervision of the Clerk of the Circuit Court, and its error in having its order signed by only two Justices, only one of whom sat in the case: It is submitted that the record discloses no justification for such "wedding-haste" on the part of the Circuit Court in rendering its opinion in Case No. 2142; and that said action of the Circuit Court raises a serious presumption that the issues raised in Case No. 2142 were not properly before the Justices of the Circuit Court and had not received all of the consideration to which they are entitled before that Court's opinion was rendered and its order was entered. The foregoing statements would seem to be substantiated by the fact, of record, that the order of the Circuit Court in Case No. 2142 was signed by only two Justices, only one of whom sat in the case at the time it was heard.

(III) Arguments Addressed to the Fact that the Circuit Court Has Misinterpreted or Ignored Salient and Controlling Facts of Record, Admitted by the Respondents.

(1) The Circuit Court has misinterpreted or ignored salient and controlling facts of record, admitted by the respondents.

(a) The Petitioner does not justify his failure to institute a court action to assert his rights solely upon the ground of refusal of the escrow-bank to deliver the leases to him, and the ground of pending litigation; in fact, no duty has devolved upon the Petitioner, at any time, to institute court proceedings to avert his claims and title to the properties involved. (R. 64.)

The Circuit Court finds and holds in its opinion that: "The only excuse offered by plaintiff for this inordinate delay in instituting his action is that the acts of defendants and the bank in refusing to deliver the leases, and pending litigation, have prevented him from carrying out the agreement to drill a well." (R. 64)

The quoted finding of the Circuit Court is erroneous and is contrary to the facts of record, in that it fails to cover all the pertinent facts of record.

The record shows that, in addition to the refusal of the escrow-bank to deliver the leases to the Petitioner, and in addition pending litigation, clouding the Petitioner's title to property involved, his title was clouded also by the execution and delivery of top-leases by respondent lessors to other parties. (R. 10, 11, 12, 13, 14)

As has been demonstrated heretofore in this brief, no duty has devolved upon the Petitioner to institute Court proceedings to assert his claims and title to the properties involved.

Therefore, the Petitioner does not justify his failure to institute a court action to assert his rights solely upon the ground of refusal of the escrow-bank to deliver the leases to him, and the ground of pending litigation.

(b) Continuous litigation involving the leases was of such nature as to prevent the petitioner from safely proceeding to develop the same under the terms of the escrow agreement. (R. 10, 11, 12.)

The complaint, the allegations in which have been admitted by the Respondents to be in accordance with the facts, alleges that continuous litigation involving the leases was of such nature as to prevent the Petitioner from safely proceeding to develop the same under the terms of the escrow agreement. (R. 10, 11, 12)

In this connection, reference is made to the succeeding arguments in this brief.

(c) The Circuit Court erroneously found that a period of eight years has elapsed when no litigation was pending. (R. 9, 10, 11, 12, 23, 66.)

The complaint contains an allegation of fact, which the respondents have admitted to be true, that "continuous litigation since about April 2, 1924" has involved some portion of the property here in issue. (R. 12)

In the complaint, the Petitioner named certain of the court proceedings comprising part of said continuous litigation, and alleged that the Petitioner "at the proper time will make proof", during a hearing of the issues in this cause of action, in regard to the details relating to said "continuous litigation". (R. 11); also that: "The last suit involving any portion of the property herein described was dismissed in the Supreme Court of the State of Kansas in the month of July 1938". (R. 12) The complaint in this cause was filed in the District Court on December 30, 1938, about five months after dismissal in the Supreme Court of the State of Kansas of litigation involving the properties here in issue.

It follows that the Circuit Court erroneously found that a period of eight years has elapsed when no litigation was pending.

(d) The Petitioner did not sit by for more than fourteen years without asserting a claim to the property involved, as the Circuit Court erroneously finds. (R. 9, 10, 11, 12, 13, 23, 66.)

The record shows that:

> "Upon the completion of said derrick and spudding in of said well, this plaintiff demanded of and from said bank, its agents, servants and employees, said leases so placed in escrow, under said escrow agreement, the delivery of which was refused by said bank. That notwithstanding refusal to deliver said leases to plaintiff, said plaintiff drilled a well upon the property to a total depth of approximately 600 feet, during all of which time the plaintiff insisted and demanded of said bank the delivery of said oil and gas leases, as provided by said escrow agreement, the delivery of which was denied by said bank, its agents, servants and employees, and especially the defendant, M. K. Mathews, who was the Cashier of said bank and the party who entered into the escrow agreement for and on behalf of said bank." (R. 10)

The record shows, also, as follows:

> "Plaintiff further states that in absolute violation of the escrow agreement and the oil and gas leases executed by said lessors, the said escrow-bank returned all of said oil and gas leases to the said defendants and refused to deliver said oil and gas leases to the plaintiff herein, or his agents, servants and employees, after the demand." (R. 11)

Furthermore, the record discloses that:

> "Plaintiff further states that on the fourth day of February, 1930, by and through his attorney, the Honorable John T. Bottom, of Denver, Colorado, served notice upon all of the lessors, defendants herein, to deliver to the plaintiff said oil and gas leases so executed and placed in escrow in said bank; a copy of said notice and letter so served upon said defendants, being hereto attached, marked Exhibit 'E,' and made a part hereof; but that the said defendants and lessors after due notice have failed, neglected and refused, and

still fail, neglect and refuse to execute or deliver to this plaintiff any of said oil and gas leases." (R. 12, 13, 23)

The record shows the facts, in addition, that the Petitioner had the escrow agreement and the assignment thereof to him recorded. (R. 9, 10)

Moreover, the Petitioner was a party, appeared, and fought to protect his rights in the various cases comprising the continuous litigation (R. 10, 11, 12):

In the light of the facts of record summarized above, it is submitted that the Petitioner did not sit by for more than fourteen years without asserting a claim to the property involved, as the Circuit Court erroneously finds.

As has been demonstrated heretofore in this argument, no obligation has rested at any time, either in law or in equity, upon the Petitioner to institute *court proceedings* in order to *"assert"* his claim to, and title in, the lands here involved. The actions taken by the Petitioner, disclosed by the record, have been sufficient to *"assert"* the claim of the Petitioner to the property in issue.

(e) The Circuit Court incompletely recited the terms and conditions of the leases as to the extent of their duration, when it held that: "The leases were five year leases, providing by their terms that they were to expire five years from date, unless oil and gas was then being produced on the premises." (R. 62)

The Circuit Court in its opinion finds and holds that: "The leases were five year leases, providing by their terms that they were to expire five years from date, unless oil and gas was then being produced on the premises". (R. 62) That Court has incompletely recited the terms and conditions of the leases as to the extent of their duration, because, as has been demonstrated heretofore in another heading under this argument, the Petitioner is now entitled to have the full time provided for in said leases for the performance of all obligations devolving upon him, after the delivery to him of said leases, or other similar leases,

subsequent to the time when the Court shall have adjudged the Petitioner to be the equitable owner of said leases and to be entitled to delivery thereof. In other words, the leases running from the Respondent lessors to the Petitioner did not expire five years from their date, because of the wrongful acts of the Respondent escrow-bank and the Respondent lessors.

(f) It is misleading to find, as the Circuit Court has erroneously done, that: "The original leases have expired by their own limitations. Other leases have been given to other parties who have developed the premises and brought in production." (R. 64.)

In view of what has been said, under the last preceding heading of this argument, to the effect that the leases from the Respondent lessors to the Petitioner have not expired, due to the wrongful acts of the Respondent escrow-bank and the Respondent lessors, it follows that the Circuit Court's finding, and holding that: "The original leases have expired by their own limitations" (R. 64) is erroneous. The Circuit Court, in its opinion, correctly finds and holds that: "Other leases have been given to other parties who have developed the premises and brought in production"; but the wrongful granting of those other leases by the Respondent lessors to other parties constitutes one of the wrongful acts which has prevented the leases from the Respondent lessors to the Petitioner from expiring. (R. 64)

(g) At no time has the Petitioner been remiss in complying with his contractual obligations relative to the drilling of an oil and gas well upon the property involved. (R. 21, Ex. D.)

The leases, the escrow agreement, and the agreement extending for two years the terms of said escrow agreement, contain provisions all of which are simple, unambiguous, and require no court interpretation, inasmuch as no dispute has arisen or exists between the Petitioner and the respondents with respect to the manner in which said documents should be construed. It follows, therefore, that the

issue as to whether at any time the Petitioner has been remiss in complying with his contractual obligations relative to the drilling of an oil and gas well upon the property here involved may, and must, be determined upon the basis of the facts of record, as applied to the provisions of those documents.

The complaint contains allegations, the truth of which the Respondents have admitted, that "he (the Petitioner) has at all times since the execution of said oil and gas leases, and the entering into of said escrow agreement, been ready, able and willing to carry out all the provisions of said leases and said escrow agreement by drilling a well upon said premises or some portion thereof as provided by said escrow agreement, but has been prevented from so doing by the acts and conduct of said lessors and defendants herein and other defendants" (R. 12), and that "he (Petitioner) has at all times endeavored to carry out his agreement, but has been prevented from so doing by the original lessors and the subsequent lessees who plaintiff is informed claims leasehold title to said properties" (R. 15), and that "he (Petitioner) has at all times complied insofar as possible, with the escrow agreement and the provisions of said leases." (R. 13)

It is submitted that the undisputed facts of record recited above show that at no time has the Petitioner been remiss in complying with his contractual obligations relative to the drilling of an oil and gas well upon the property involved.

(h) The Petitioner has at all times since the execution of the leases involved, and the entering into of said escrow agreement, been ready, able and willing to comply with the provisions thereof, but has been prevented from so doing by the acts and conducts of the Respondents. (R. 12, 13.)

The record discloses that the Petitioner has at all times been ready, able and willing to carry out all of the provisions of said leases and said escrow agreement but has been prevented from so doing by the wrongful acts of the Respondents. (R. 12)

Under the circumstances, the contentions outlined in the above heading are substantiated and should be accepted by this Honorable Court.

(i) In violation of the escrow agreement and the escrow leases, the escrow bank returned all of said escrow leases to the Respondent lessors and refused to deliver said leases to the Petitioner, after due demand. (R. 11, 12.)

The opinion of the Circuit Court finds and holds that: "The bank refused to deliver the leases to plaintiff but returned them to the landowners, who thereafter gave leases to other persons". (R. 62.) The foregoing statements are upheld by the facts of record contained in the complaint and are admitted by the Respondents to be true. (R. 11, 12.)

(j) The reasons why the oil and gas well, which was spudded in and drilled by the Petitioner to a depth of 600 feet on the property involved, was never completed, were refusal of the escrow bank Respondent to deliver to the Petitioner the leases held in escrow by it, and "continuous litigation" the pendency of which clouded the Petitioner's title, also, execution and delivery of top leases by lessor Respondents to other parties, thus clouding Petitioner's title to the property. (R. 10, 11, 12, 13, 14.)

The correctness of the facts recited in the above heading is substantiated by the facts of record.

As to the fact that the oil and gas well, which was spudded in and drilled by the Petitioner to a depth of 600 feet on the property involved, was never completed, because of refusal of the escrow bank Respondent to deliver to the Petitioner the leases held in escrow by it, reference is made to the facts of record quoted below:

> "Plaintiff further states that he has at all times since the execution of said oil and gas leases, and the entering into of said escrow agreement, been ready, able and willing to carry out all of the provisions of said leases and said escrow agreement by drilling a well upon said premises or some portion thereof as provided by said escrow agreement, but has been pre-

vented from so doing by the acts and conduct of said lessors and defendants herein and other defendants." (R. 12)

In regard to the fact that continuous litigation the pendency of which clouded the Petitioner's title to the property involved, prevented the Petitioner from completing the oil and gas which was spudded in and drilled by the Petitioner to a depth of 600 feet, the record is clear. (R. 10-12)

With respect to the fact that execution and delivery of top leases by lessor respondents to other parties, thus clouding the Petitioner's title to the property in issue, resulted in preventing completion of the oil and gas well which was spudded in and drilled by the Petitioner to a depth of 600 feet, there is no dispute between the parties. (R. 12-14)

(k) Respondents had actual notice of Petitioner's claim and title to property involved, and had a demand for delivery of the leases covering said lands; the escrow agreement and the assignment thereof to the Petitioner were recorded, thereby providing constructive notice to Respondents of Petitioner's claim and title; and the Respondent oil companies took top-leases upon said lands, with both actual and record notice of the Petitioner's claims and rights. (R. 9, 10, 11, 12, 13, 20, 21, 22, Ex. B, Ex. C, Ex. D).

In regard to the issues of actual and constructive notice to the Respondents of Petitioner's claim and title to the property involved, the record demonstrates, and the Respondents admit the facts to be, that the Respondents had actual notice of Petitioner's claim and title to the property in question at the time that the Respondent, M. K. Mathews, Cashier of the Bunker Hill State Bank, entered into an agreement and conspiracy with the Respondent lessors (R. 11), to defeat the rights of Petitioner to said properties; and on February 4, 1930, when John T. Bottom, attorney for Petitioner, served notice upon all of the Respondent lessors to deliver to Petitioner the oil and gas leases executed and placed in escrow in the bank. (R. 12, 13)

The record discloses, also, that the Respondents had constructive record notice of the Petitioner's claim and title to the property involved because the escrow agreement was duly recorded (R. 10, 20, Ex. B), and for the reason that the assignment of the escrow agreement from the Focks Drilling and Manufacturing Corporation to the Petitioner was duly placed of record. (R. 9, 20, 21, Ex. C.)

In this connection, reference is made to 40 *Corpus Juris*, pp. 1116, 1117, from which the following quotation is excerpted:

> "As to prior lease. An assignee of an oil or gas lease takes subject to the rights of a prior lease, *of which he has, or is chargeable with, notice*, particularly where the assignment so stipulates or where the prior lease has been recorded. If he takes with knowledge of a prior lease and of the facts upon which depends *A QUESTION OF FORFEITURE THEREOF*, he has no greater rights against such prior lease than his assignor and when taking an assignment, which on its face contains notice of the liability of forfeiture, the assignee is bound to ascertain, at his peril, whether the lease has been forfeited." (Emphasis supplied.)

As the escrow agreement was recorded (R. 10, 11), under the above rule laid down in *Corpus Juris*, that instrument having been recorded, anyone dealing with the property here involved was bound to take notice, and was bound to ascertain whether the escrow agreement and the leases executed under it had been forfeited.

The Respondents may contend, as they did in the court below, that the recorded escrow agreement was not acknowledged, and that hence it did not impart notice. But the Petitioner alleges in his complaint both actual and constructive record notice. And as to whether the recorded escrow agreement imparted notice, notwithstanding the fact that it was not acknowledged, the rule in Kansas is laid down in the case of *Knowles* v. *Williams*, 58 Kan. 221, decided by the Supreme Court of that State, and is as follows:

> "Purchaser of land bound to know facts appearing in or suggested by title papers: A purchaser of land must look to the title papers, under which he purchases, and he is chargeable with notice of the facts appearing upon their face and also with knowledge of all the facts suggested therein and which, with the exercise of reasonable prudence and diligence, he might have ascertained."

Most certainly, even though the escrow agreement was of record and not acknowledged, it would furnish a clue which, if an investigation had been made, would have developed the true facts as to the claim of the Petitioner. "The instrument, itself, if there were one, had no validity except between the parties and those having actual notice, not of what was of record, but of the instrument itself." (*Bannister* v. *Fallis,* 85 Kan. 320, 322)

A number of decisions are cited and commented upon in the brief of appellant, filed with the Circuit Court in Case No. 2022, a copy of which is annexed to this argument brief in support of the Petitioner's petition for a Writ of Certiorari, which hold that matters suggested by a record, or clues shown by a record, are sufficient to place purchasers, such as the respondent top lessors, on inquiry, and binds them as to the facts which such an inquiry might disclose. Particular attention is invited to the case of *Nordman* v. *Rau,* 86 Kan. 19, holding:

> "The precise question involved is whether one who has seen and read in the records in the office of the Register of Deeds what is, in fact, a copy of an existing, unacknowledged instrument, is to be regarded as having 'actual notice' of the instrument, itself, within the meaning of the statute. * * * But the general rule is that evidence of facts and circumstances sufficient to put upon inquiry amount to actual notice. * * * 'Actual Notice' does not mean that which is metaphysical. Strictness is actual in its nature because it is seldom that ultimate facts can be communicated in a manner so direct and unequivocal as to exclude doubts as to their existence or authenticity. Actual notice

means, among other things, knowledge of facts aand circumstances so pertinent in character as to enaible reasonably cautious and prudent persons to inveestigate and ascertain as to the ultimate facts. (Pope vv. Nichols, 61 Kan. 230, 236, 59 Pac. 257.) 'Actual notice' may be either express or implied. That is, it mmay consist of knowledge actually brought personally hhome, or it may consist of knowledge of facts so informiing that a reasonable cautious person would be led by them to the ultimate fact."

With the escrow agreement spread of record in the county where all of the lands covered by the leases iin question are situated, that escrow agreement, whether aacknowledged or unacknowledged, constitutes more than a suggestion putting the respondent top lessees on notice, uinder the doctrine "caveat emptor" (*Knowles* v. *Wilson, suppra*). It is more than a clue (*Mining Company* v. *Atkinson,*, 85 Kan. 357). And the issue falls within the decision in *Wordman* v. *Rau, supra,* holding that where one has seen and read the record of an unrecorded instrument, he has actuaal notice. Most certainly, such an instrument whether acknowledged or not, if spread of record, would put a reasonably prudent person on inquiry, and such inquiry would have resulted in the ascertainment of the facts with respect to the Petitioner's claim.

The recorded instrument named the bank wherre the information could have been obtained. It named tthe township and range numbers where inquiry could hiave been made of the landowners and full information obtained. It mentioned the drilling of a well, or drilling operatiions. The entire community knew about the drilling operations. It mentioned M. K. Mathews, Cashier of the escrow bank. Under the circumstances, the Respondent top-lessees were placed on notice to seek information from Matthews. It contained the name of the Focks Drilling and Manufacturing Corporation; therefore, the respondent top lessees were placed on notice to contact that corporation's officials for

the purpose of ascertaining facts concerning the Petitioner's claims.

(l) Respondent, M. K. Mathews, Cashier of the Bunker Hill State Bank, entered into an agreement and conspiracy with the lessor Respondents to defeat the rights of the Petitioner to the properties involved; and said Mathews and the Respondent lessors destroyed said leases. (R. 11, 12.)

The record discloses that the Respondent, Mathews entered into an agreement and conspiracy with the lessor Respondents to defeat the rights of the Petitioner to the properties involved; and that said Mathews and the Respondent lessors destroyed the leases which had been placed in escrow with the escrow bank of which Mathews was Cashier. (R. 11, 12.)

(m) The Respondent lessors, by and through M. K. Mathews, Cashier of the escrow-bank, and other parties, executed oil and gas leases upon all the properties here involved and said property has been continuously under lease to parties other than the Petitioner since the provisions of said escrow agreement were violated by Respondents, and thereby said Respondents have clouded the title of the Petitioner to the property involved, and have prevented him from completing drilling operations upon said property. (R. 12.)

The statements of facts contained in the above heading are substantiated by the facts of record. (R. 12.)

(n) The complaint prays that a receiver shall be appointed by the Court to take charge of and to operate the properties involved, to produce oil therefrom, to market the same subject to the order of the Court, and that the Respondents who have heretofore produced oil and gas from said properties shall be required to account for the same. (R. 15, 16.)

The Circuit Court, in its opinion, ignored the fact that the complaint prays that a receiver shall be appointed by the Court.

The complaint contains such a prayer. (R. 15, 16.)

(F) CONCLUSION.

It is, therefore, respectfully submitted that this is a case calling for the exercise by this Honorable Court of its supervisory powers, in order that justice may be accorded to the Petitioner, and that to such an end a writ of certiorari should be granted, and this Honorable Court should review the decision and orders of the United States Circuit Court of Appeals, Tenth Circuit, and finally reverse them.

Respectfully submitted,

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